UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*UNITED STATES OF AMERICA *
* CRIMINAL ACTION
v. * No. 08-10071-RGS
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BRIMA WURIE *
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BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
MOTION TO SUPPRESS HEARING
January 20, 2009

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE, (By Special Assistant United States Attorney Gretchen Lundgren, AUSA) 1 Courthouse Way, Suite 9000, Boston, Massachusetts 02210, on behalf of the United States of America

LAW OFFICES OF JOHN BENZAN, (By John Benzan, Esq.) Suite 8, P.O. Box 620667, Newton Lower Falls, Massachusetts 02462, on behalf of Defendant

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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court.

Court is open. You may be seated.

Criminal Action No. 08-10071, United States of America versus Brima Wurie.

Counsel, please identify yourselves for the record.

MR. LUNDGREN: Good afternoon, your Honor. Gretchen Lundgren for the United States.

MR. BENZAN: Good afternoon, your Honor. John Benzan on behalf of Mr. Wurie.

THE COURT: The reason that I wanted to hear from counsel on the motion to suppress is that I'm a bit baffled by what the basis of the motion is, and I say that Mr. Benzan for this reason. The ultimate search, which I understand is the search that lead to the incriminating evidence, is the search of the apartment that belonged to Ms. Walker.

What I don't see -- and that, of course, means that the burden shifts to the defendant to show me that there was some defect in the search. But even before we get to that issue, there has to be some expectation of privacy claimed on the part of the defendant.

Ms. Walker is not accused of any crime. The evidence was seized from her apartment. I have two affidavits that have been filed by the defendant. In neither affidavit does he claim any residence in, reasonable expectation of privacy, in the apartment itself.

That being the case, it's not clear to me how I could ever reach the point of allowing suppression of the evidence.

MR. BENZAN: Allow me, your Honor.

I don't -- I feel I was unclear with respect to what we were moving to suppress. Our first challenge is to the search of the cell phone by the police while my client was being booked at, I believe it was C-6, Area C-6 in South Boston.

They arrested my client on the street for what they purport to be a hand-to-hand sale that occurred in a car. Actually, no visible hand to hand was seen. As you read from the affidavit, Sergeant Murphy indicates he saw Mr. Wade meet up with my client, be involved in a short car ride. There is a seizure from Mr. Wade of two small plastic bags of cocaine.

My client is subsequently arrested some distance away by himself for the alleged distribution of those two packages to Mr. Wade. My client is seen and found driving a car -- actually seen parking the car.

The police search him. They don't find any other drugs on him. They don't find any drugs in the car. They arrest him for the distribution -- alleged distribution to Mr. Wade and bring him to the police station.

He's undergoing the booking process when it's alleged that his -- one of his phone rings. The police officers search the -- look into the phone and find some personal information in the phone. It seems that they see that the phone -- based on the affidavit by the government, the government witness, the affiant, indicates that he sees that the phone -- my client's receiving phone calls from his house, "my house."

Our challenge is that's not enough. The police didn't have the authority or justification to open the phone and find the telephone number beginning (617)315- and four other digits after that. Our challenge is that they didn't have the right to do that. From there they went and found some address.

THE COURT: Let's assume all that's true. Let's assume -- and I'm not so sure we should -- but let's assume it was wrong for the police to obtain Ms. Walker's address by searching your client's cell phone.

There still is no expectation of privacy claimed in the apartment. So why would that make any difference?

The police have the evidence. I can see Ms. Walker might complain that they wouldn't have known of the existence of me or the apartment but for the search of the phone, but what standing does your client have to assert her right with respect to the search of her apartment and the seizure of evidence from her apartment?

MR. BENZAN: Well, before we even get to there, your Honor, and I am not really arguing that we have standing to move to suppress the items in the apartment.

We're moving to suppress the cell phone and the information they have retrieved.

THE COURT: Let's say I allow that right now. What difference does that then make? The government doesn't care about the cell phone. It cares about what it claims is evidence in the apartment it can connect back to your client.

MR. BENZAN: It's the cell phone, in our opinion, that's the thrust of the Commonwealth's [sic] connection between my client and the apartment. The apartment is not in his name. Although there's some paperwork there with his name on it and there's pictures, that did not belong to him. Every piece of item that he's ever owned -- he resides on Speedwell Street and has always lived there. His license, the rental application that he had, his job, his school applications, everything is at 51 Speedwell Street.

So the government -- it is our concern that the government will use the cell phone and the "my house" attribution to the telephone number there against my client at trial.

THE COURT: Okay. To be absolutely clear, you're saying, okay, we're not challenging anything seized from Ms. Walker's apartment?

MR. BENZAN: We don't --

THE COURT: We're challenging --

MR. BENZAN: As the Court indicated, we don't have standing. We don't have a possessory interest in the apartment.

THE COURT: This is very helpful.

Your challenge is directed strictly to the cell phone and any derivative use the government might make of information that was on the cell phone, at least as it was observed by police the night of the arrest?

MR. BENZAN: Exactly.

In addition, your Honor, our second challenge is the seizure of my client's keys that were used to enter the building to at 315 Silver Street.

THE COURT: Again, I can see how Ms. Walker could object to that. There was nothing incriminating, is there, about the key, except it fit, what, the outside lock and the interior lock?

MR. BENZAN: Right.

Well, the Commonwealth -- the government, we're concerned they will attempt to use that to incriminate my client, the fact this he was in possession of that key.

THE COURT: I think that's a reasonable apprehension on your part.

The government, of course, responds that there are cases that tell us that the insertion of a key in a lock is not a search.

I assume that that's not what you're challenging. You're challenging the seizure of the keys themselves?

MR. BENZAN: The seizure of the keys with absolutely no justification.

THE COURT: Why was that not proper under either a booking-inventory theory or a search-incident-to-arrest theory?

MR. BENZAN: Dealing with the search-incident-to-arrest theory, the police would be justified to seize the keys if the keys were connected to the crime for which my client was arrested.

THE COURT: That would be true under state law, not under federal law.

MR. BENZAN: What my -- well, my argument is they're allowed to search his person. They're allowed to look for items of a criminal nature, and they're also allowed to look for items that may pose a threat to the safety of the police officer.

THE COURT: You're citing Chapter 276, Section 1, to me. That's a state law case which has no binding effect or authority in federal court.

MR. BENZAN: But there's still no justification for the police to seize the keys.

THE COURT: There doesn't have to be under federal law.

A search incident to arrest under federal law is a general authority to search. It doesn't require probable cause. You have to believe that any item seized, in fact, is incriminating, or potentially a weapon that a defendant can use.

State law would be different. That would be Commonwealth v. O'Toole, as I said, Chapter 276, Section 1. But we're not bound -- in fact, a case of mine, I believe ten days ago, just came down from the First Circuit, the Graham case, saying exactly that; State law, to the contrary, has no effect in a federal proceeding.

MR. BENZAN: I read the case, your Honor.

But what -- I'm not disputing the fact that the police had the right to search.

My dispute still stands that despite finding keys, they had no right to take them.

THE COURT: I think probably a better argument you can make is that, but for -- whether the keys were rightfully in the possession of the police or not, certainly I would think they have the right as part of the booking or search incident to arrest to take the telephone; probably more cause to take the telephone, rather than, necessarily, the keys, as the keys could prove to be evidence, as they, in fact, turned out to be in this case.

You might want to argue that, but for the search of the cell phone, they might not have had any suspicion of the keys or ever attempted to use the keys and gain access to Ms. Walker's apartment.

Since we have narrowed it down, Ms. Lundgren, why don't we hear from you.

MR. LUNDGREN: Thank you, your Honor.

It seems like we kind of distilled this down to a search of a cell phone, if I may infer that. And with respect to the law, the government has briefed that in its opposition, so I'll briefly touch upon that, unless as you have specific questions for me.

As you were mentioning, the case law does indicate that the government -- that law enforcement, upon a lawful arrest, can conduct a search, and any items obtained during that search can be used in the course of the investigation.

And in the cases that are most analogous to this situation, I would suggest, or where the First Circuit has analyzed searches of items obtained incident to arrest are of personal belongings, such as wallets.

Or our technology has evolved since then, your Honor, but I think this is a distinction without a difference.

A cell phone is similar to a wallet taken in the various cases. And in those case -- I believe it's Sheehan and Uricoechea-Casallas, which I cite in my brief, are incidents in which law enforcement has made a valid arrest of an individual for one reason. During the search of that person's personal belongings, have found evidence that led to a different crime. And the Court upheld that search and the seizure of that information saying that the search incident to arrest is a pretty broad exception to the warrantless searches.

And, in fact, the Court in the Sheehan case was saying it's actually good police work to continue an investigation, to take those extra steps to see what evidence is yielded by searching these personal items.

THE COURT: Interesting analogy, but do you think a wallet is really analogous to a cell phone?

MR. LUNDGREN: Not the wallet itself, your Honor, but the information contained within the wallet.

In the Sheehan case, it was a piece of paper with names and phone numbers written down stored in the wallet. And what the officer did was opened up the wallet, took the piece of paper, photocopied it, and then followed up with those names and phone numbers, which later linked the defendant, who was already a suspect but not accused, in a bank robbery.

In this case, your Honor, what the police did is they had the cell phone. They obtained a name, so to speak, which is "my house," a phone number linked to that, followed up on that; and that led them simply to an address, and from there they took investigatory steps and obtained a search warrant.

THE COURT: Would it make a difference if the cell phone had a coded lock, in effect on it, as mine does? If you don't know my access code, you can't --

MR. LUNDGREN: I think at that point -- an interesting development in the case, though, your Honor, is seeing the call history, which really is what we're talking about here, because the police saw an incoming call called "my house," and that's what piqued their interest. And that's the number they obtained.

What some of the courts have found, and I believe I've cited this in Note 4, your Honor, some of the courts are finding that the information in the call logs are not protected by a defendant's privacy interests. Because these are information -- phone numbers dialed and calls received is information a telephone company has, and it's information that can be obtained via a pen register.

So that might be a distinction.

Here, this information was taken from the call log, instead of any type of personal contact or address book. And courts in other districts have found that that is not information protected by a defendant's privacy interests.

THE COURT: Although the pen register analogy may not be a terribly good one because pen registers, don't they require at least some kind of permission.

MR. LUNDGREN: They do, but it's a warrant or some type of court order that you get through the phone company. So it doesn't really necessarily implicate a defendant's privacy interest.

THE COURT: Whereas here, we're going directly -- I mean, this would be somewhat equivalent to if someone searched your phone, as opposed to records that the phone company would have, the phone company being a third-party --

MR. LUNDGREN: Exactly. That is correct, but I guess the link I am trying to make is maybe that information may not be protected by any privacy interest.

THE COURT: Now we're getting to an interesting issue, and this is actually more --

Mr. Benzan, this is an issue I wouldn't mind addressing because I think it is an important one, and I think it might actually have some traction to it. Whereas, I think any sort of generalized, You didn't have probable cause to arrest, clearly they did because they had a named informant who said, I bought these drugs from your client.

We don't have an expectation of privacy, or at least not one we're willing to claim, in the apartment, and I can think of a lot of reasons why that might be true.

But we do have an interesting issue about the cell phone and the link between the cell phone and the keys. Is the cell phone different? Does what the police did somehow put us in a different position?

I know the wallet cases, and Mr. Lundgren describes them correctly. However, I'm not at this moment ready to say that they are a perfect analogy under the circumstances.

She did address the cell phone cases. Actually, she addressed a number of them in her brief. I want to give you a chance to respond to those cases.

What could focus all of this, unless there is some reason to disagree, is if we can agree on the facts that are set out -- is it the Murphy affidavit that you cite?

MR. LUNDGREN: Actually in both affidavits, your Honor. It's touched upon briefly by Sergeant Detective Murphy, but more specifically by Officer Robert England.

THE COURT: If the two of you could stipulate on the sequence of events; that is, the booking, the cell phone is taken from the defendant's person, it rings, officers look and see the reference to "my home." They then go to the call log and, using the call log, then make the connection between Ms. Walkers's apartment and what they believe to be the defendant and the keys.

If we can agree that that was the sequence of facts, then I can address the actual legal issues, rather than -- it seems to me I can have the officers come in and recite the affidavit, I suppose, but if there is no real dispute as to the factual sequence, I would rather get on to the issue.

MR. BENZAN: There is no dispute. I think we're both in agreement that that's at least what the police have told us how they did it.

THE COURT: All we're concerned about is the facts that involve the seizure of the cell phone and the examination of the number.

So if we can agree on those facts, let's start with those as the operating nucleus.

Mr. Benzan, why don't I give you 14 days to brief the issue of the cell phone search and its possible then connection to the use of the keys.

MR. BENZAN: I think that's fair, your Honor.

THE COURT: And then would you like a brief time to -- I'm sure you want to reply.

MR. LUNDGREN: Your Honor, I wouldn't duplicate anything in my original opposition, but if there's something I think the government should respond to, I would like an opportunity.

THE COURT: You can probably do that in a week, don't you think?

MR. LUNDGREN: Oh, yes.

THE COURT: I certainly don't want you to repeat what you've already done.

MR. LUNDGREN: Yes, your Honor.

THE COURT: Good.

This is very helpful then. I think we have a roadmap.

Mr. Benzan, I will have your -- you're going to brief, again, on the issues of the propriety of the search of the cell phone call record, either pursuant to a search incident to arrest or the booking inventory exception.

And then, depending how that is revolved, whether, in fact, it then taints any use of the keys.

I think we can assume the keys, like the cell phone itself, was properly taken as part of the search incident to arrest and then inventoried. The question is the use that was made of them, I think, would be the issue we're concerned with.

MR. BENZAN: I agree.

THE COURT: Okay. Good.

Thank you, counsel.

THE CLERK: All rise.

Court is in recess.

(Proceedings adjourned.)

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons October 22, 2010

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